

BEFORE THE
PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
DOCKET NO. 2018-163-E

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| In Re: |) | |
| |) | |
| SolAmerica SC, LLC and Edgefield County |) | |
| S1, LLC, |) | |
| |) | |
| Complainants, |) | |
| |) | |
| vs. |) | MOTION TO DISMISS THE |
| |) | COMPLAINT TO MAINTAIN |
| South Carolina Electric & Gas Company |) | STATUS QUO |
| |) | |
| Defendant/Respondent. |) | |
| <hr/> |) | |

Pursuant to 10 S.C. Code Ann. Regs. § 103-829(A) and Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, Defendant/Respondent South Carolina Electric & Gas Company (“SCE&G”), hereby moves for an order of the Public Service Commission of South Carolina (“Commission”) dismissing the Motion to Maintain Status Quo (“Complaint”) filed by solar developer Complainant/Petitioner SolAmerica SC, LLC and Edgefield County S1, LLC (collectively “Complainants”). The Complaint in this matter is not supported by fact or law and does not set forth a claim of relief against SCE&G or a basis for granting relief.

BACKGROUND

Complainants filed their Motion to Maintain Status Quo during the evening hours of May 9, 2018. Complainants’ Motion to Maintain Status Quo sought Commission intervention to preserve the Power Purchase Agreement executed between SCE&G and Complainants on April 9, 2018 (“PPA” or “Agreement”), which terminated automatically by its own terms when

Complainants failed to post the Development Period Credit Support required within 30 days of the Effective Date of the PPA.

SCE&G petitioned to intervene and filed its Response in Opposition to the Motion to Maintain Status Quo on May 21, 2018. The Commission issued an Order on June 6, 2018, where, among other things, the Commission noted that it construes the Request for Modification and Motion to Maintain the Status Quo as “Complaints against the utility.” Because the Commission construes Complainants’ filing as a Complaint, SCE&G is now converting its Response in Opposition to the Motion to Maintain Status Quo to a Motion to Dismiss the Complaint to conform procedurally. SCE&G incorporates its Response in Opposition to the Motion to Maintain Status Quo in its entirety in the instant Motion to Dismiss.

ARGUMENT

A motion to dismiss brought under Rule 12(b)(6) tests the legal sufficiency of a complaint. A court should dismiss a complaint for failure to state a claim upon which relief can be granted if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Slack v. James*, 356 S.C. 479, 482, 589 S.E.2d 772, 773-74 (Ct. App. 2003). Complainants’ Complaint does not meet this standard as it is not based in fact or law, the basis for relief conflicts with the plain terms of the PPA, and it fails to articulate a basis for “maintaining the status quo.”

Complainants breached the terms of the PPA by failing to post the Development Period Credit Support in the time period set forth in the PPA. As the breaching party, Complainants assert no allegation or claim against SCE&G, nor does the Complaint set forth persuasive facts or arguments in support of their request to revive and extend the deadlines under the PPA so it may secure additional funding. From the plain reading of the language in Section 9.3(a) of the

PPA, it is clear that Complainants' failure to post the Development Period Credit Support on May 9, 2018, voids, nullifies, and terminates the PPA. The PPA, by its own terms, automatically terminates with no opportunity to cure and without any required action on the part of SCE&G to terminate or nullify the Agreement. Complainants' unilateral failure to post the Development Period Credit Support terminated the PPA.

Complainants' only basis for preservation and amendment of the PPA is that an extension of time under Section 9.3 is needed to "align the Project completion date in the [PPA]...and that certain Interconnection Agreement, between the Complainants and SCE&G...." First, the PPA does not provide for extension for the posting of security. Indeed, Section 9.3(c) assumes the Development Period Credit Support is posted and only allows the modification of the *form* of the Support so long as the Support "shall at all times satisfy the requirements of [the PPA]." The desire to align the time periods of these contracts does not constitute grounds for or a defense of failure to post the required security. As set forth in the Response in Opposition previously filed, the IA and the PPA are two separate agreements. Indeed, Section 15.5 of the PPA states: "[t]he Agreement, together with all Attachments, constitutes the entire agreement between the Parties relating to the transaction described herein and supersedes any and all prior oral or written understandings." *See e.g. Wilson v. Landstrom*, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct.App.1984) ("A merger clause expresses the intention of the parties to treat the writing as a complete integration of their agreement.") Conforming the dates of a separate agreement outside of the PPA is not appropriate or necessary in this circumstance, particularly where the Parties just executed the PPA. If Complainants felt alignment was necessary, they should have raised

this during the negotiation of their PPA or raised it with the Commission when the PPA was filed.¹

Complainants' self-serving basis to extend the time by which they must make the Development Period Credit Support under the PPA, sought within a mere 30 days after agreeing to such terms by executing the PPA, demonstrates that Complainants did not negotiate and enter into the PPA in good faith, an explicit requirement under the PPA. *See* Section 15.8 of the PPA. Complainants knew and understood that the Development Period Credit Support would be due within 30 days of execution. At the time of execution, Complainants should have been in a position to know whether the funding necessary was available to satisfy this key term of the PPA. Complainants now seek to use the Commission's time for review and hearing, plus an additional requested 30 days after issuance of a future order on the Complainants' Request for Modification, as added time to secure financing for the Development Period Credit Support.

The Commission reviewed the terms and conditions of the PPA and accepted it for filing. As the Commission no doubt concluded during its review, the terms and conditions of the PPA are standard and reflect a product that was freely entered into by two sophisticated parties. The terms of the PPA and Section 9.3(a) in particular are clear. Complainants have pled no facts and asserted no arguments to the contrary. It would not be in the public interest to allow a party to execute an agreement, file it with this Commission, and then within a matter of days seek to rewrite the terms of the contract to avoid the clear and unambiguous terms to which it agreed.

CONCLUSION

For the reasons set forth above, Complainants' Complaint seeking to Maintain the Status Quo should be dismissed.

¹ Section 4.6 of the PPA explicitly allowed Complainants to align the PPA and the IA by moving the Commercial Operation Date Deadline forward and completing the project early.

[SIGNATURE PAGE FOLLOWS]

Respectfully Submitted,

s/ J. Ashley Cooper

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